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In the Supreme Court of the United States

SPRING TERM, 1971

CASE No. 71-10

INTERCONTINENTAL PROMOTIONS, INC.
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, and FRED R. BAISDEN, as executors of the Last Will and Testament of W. B. McDONALD, JR., deceased, and NEW AMSTERDAM CASUALTY CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HANSFORD H. TYLER JR.
and DAVID D. PHILLIPS
HORTON & SCHWARTZ
and MURRAY SAMS
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MIAMI REVIEW — 371-4853 — 377-3721

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeal for the Fifth Circuit, entered and rendered in the above-entitled cause on April 9, 1971, to which a Petition for Rehearing was denied on May 19, 1971.

OPINIONS BELOW

(a) *First Appeal*:

The United States District Court, Southern District of Florida, in the case entitled INTERCONTINENTAL PROMOTIONS, INC. vs. W. B. McDONALD, JR. and NEW AMSTERDAM CASUALTY COMPANY, entered an order dismissing the complaint of INTERCONTINENTAL PROMOTIONS, INC., on April 7, 1965, which cause is unreported but appears as A of the Appendix accompanying this Petition.

On October 10, 1966, the United States Court of Appeals for the Fifth Circuit, rendered an opinion reversing the order of dismissal entered by the United States District Court, Southern District of Florida, on April 7, 1965, which said opinion and decision is reported at 367 F.2d 293 and appears as B of the Appendix accompanying this Petition. Petition for Rehearing directed to the opinion of October 10, 1966 aforesaid, was denied.

Pursuant to the remand under the opinion and decision of October 10, 1966 aforesaid, the cause reoccurred for trial before the United States District Court, Southern District of Florida, without a jury and was tried resulting in findings of fact, conclusions of law and a judgment for money in favor of the Petitioner in the sum of $537,406. The findings of fact, conclusions of law and money judgment appear as C of the Appendix accompanying this Petition. A Motion for New Trial, directed to the aforesaid judgment, was denied.

(b) *Second Appeal:*

An appeal by the Respondents to the United States Court of Appeals for the Fifth Circuit, resulted in a reversal of the judgment of the United States District Court, Southern District of Florida. An opinion and decision of reversal was entered by the United States Court of Appeals for the Fifth Circuit on April 9, 1971, which said opinion has not been officially reported but the same appears as D of the Appendix accompanying this Petition. Petition for Rehearing, Petition for Rehearing En Banc, and Suggestion for Certification to the Supreme Court of Florida, were denied.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC, Section 1254 and Rule 19(b) of the Rules of the Supreme Court of the United States. The matter here involves controlling local law of the States of Florida upon which the appellate courts of Florida have not made a decision and which involves the public policy of the State of Florida as expressed in a legislative Act. Further, this case demonstrates a departure from the accepted and usual course of judicial proceedings to such an extent as to call for an exercise of this Court's supervisory powers and the exercise of its discretionary certiorari powers.

QUESTIONS INVOLVED

(a) Should the United States Court of Appeals for the Fifth Circuit, in the second appeal, have initially considered and interpreted a state statute of Florida prior to

a consideration thereof by the courts of that state where there exists the procedural machinery to obtain a ruling on state law from that state's highest tribunal and where the effect of the consideration and interpretation accorded the state statute by the Court of Appeals, was to render portions of said statute invalid.

(b) Was an opinion and decision of the United States Court of Appeals, for the Fifth Circuit, overruling its prior decision in the same case on the same point of law, a departure from the accepted and usual course of judicial proceedings to such an extent as to warrant the exercise by this Court of its supervisory powers.

STATEMENT OF THE CASE

The Petitioner, in December, 1963, entered into a written contract with W. B. McDonald, Jr., (now deceased and the present Respondents substituted in his place and stead), whereby the Petitioner sold to McDonald for a stipulated price, the right to stage and handle the live gate aspects of a world championship boxing exhibition between Cassius Clay, the challenger and Sonny Liston, the champion. The contract is included in the Appendix accompanying this Petition as exhibit E. Clay and Liston, on February 25, 1964, engaged in a world championship prize fight, at Miami Beach Convention Hall, where Clay became the new heavyweight champion by knocking out Liston in the Seventh Round.

The Petitioner's main undertaking as disclosed by the contract between itself and W. B. McDonlad, was to produce the two fighters, Clay and Liston, at a time, place

and on a date specified by McDonald and to have them available for promotional purposes. McDonald had the right and privilege to promote, stage and handle the live gate aspects of the fight and agreed to pay the Petitioner for that right, $625,000.00. The Petitioner retained all ancillary rights such as telecasting, broadcasting and moving pictures. The live gate produced slightly in excess of $224,000.00, which was paid by McDonald to the Petitioner, leaving a balance due by him to the Petitioner of approximately $400,000.00. When McDonald refused to pay the balance due under his contract, an action was brought in the United States District Court, Southern District of Florida, by the Petitioner upon the contract. The Respondents moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted and upon the further ground that the contract sought to be enforced was illegal by reasons of Florida Criminal Statutes 548.01, 548.02 and 548.03.

Florida Statutes, Section 548.01 makes the participation, etc., in such a fight a felony unless it comes within one of the exceptions to Section 548.03 of the Florida Statutes. This Section (548.03 FSA), made it lawful to conduct such fights if they are " * * * held by and under the auspices of * * * Veterans of Foreign Wars of the United States * * * or (other named organizations)," and, or where regulated by municipalities in the exercise of their police powers, such exhibitions were held " * * * under the auspices of the above-named organizations".

After the Respondents' Motion to Dismiss had been filed, the Petitioner filed an Amendment to its Complaint in which it plead specifically that the pugilistic contest in

question was held by and under the auspices of the Veterans of Foreign Wars and was licensed or permitted by the City of Miami Beach, Florida as a pugilistic exhibition held under the auspices of the Veterans of Foreign Wars. Thereafter, the Respondents' Motion to Dismiss was argued before the trial court and that court on April 8, 1965, entered an order and judgment dismissing the Petitioner's Complaint and finding that the fight held by McDonald violated Section 548.01 and 548.03 of the Florida Criminal Statutes.

From the judgment of dismissal the Petitioner took an appeal to the United States Court of Appeals for the Fifth Circuit, which Court by a two to one vote, reversed the trial court and held (367 F.2d 293) that even without the benefit of the Amended Complaint, "the contract is not on its face, unlawful, McDonald's obligation under the contract 'to stage and handle the live aspects of the promotion' *should be construed to include the burden of making arrangements for a lawful fight.* If there is any doubt as to what the parties meant, a trial should be had, not to *contradict the contract*, but to show what the parties meant by their contract". (Emphasis supplied) The cause was remanded to the trial court to determine whether the fight was held by and under the auspices of one of the approved groups.

The cause was tried in the trial court before a judge without a jury and resulted in findings of fact, conclusions of law and a money judgment for the balance due on the contract in favor of the Petitioner. Specifically, the trial judge found "that the municipality of Miami Beach exer-

cised its police powers in regulating this match and it was held under the auspices of the VFW, Post 3559".

The Respondents then took an appeal to the United States Court of Appeals for the Fifth Circuit, and that Court in a unanimous opinion, dated April 9, 1971, not yet reported but included in the Appendix accompanying this Petition, said that "The conclusion is inescapable that the Liston-Clay fight was not held under the auspices of the VFW. The use of the organization's name was a mere fiction to avoid the prohibitory Florida Statute and a representation on the printed tickets of the VFW's sponsorship was an obvious subterfuge designed to present a nominal compliance with the Florida law". The Appeals Court prefaced this statement by the observation that McDonald had performed all the necessary actions requisite to promoting and staging the fight. The Court further held "the evidence shows that the parties, *pursuant to their contract*, accomplished an unlawful purpose by virtue of an apparent subterfuge. Under the circumstances the law will leave the parties where it finds them and no relief shall be granted because of the dominate public interest." (Cites omitted) (Emphasis supplied). The Appeals Court also found that although McDonald had the obligation to conduct a lawful fight under the contract, *he could nevertheless raise his illegal compliance as a bar to the Petitioner's recovery on the contract.* (Emphasis supplied)

Petition for Rehearing, Petition for Rehearing En Banc, and a Suggestion for Certification to the Supreme Court of Florida, were all denied.

REASONS FOR GRANTING THE WRIT

(a) This Court, in UNITED GAS PIPE LINE, CO., v. IDEAL CEMENT CO., 369 U.S. 134, 82 S.Ct. 676 (1962) vacated a judgment of a circuit court of appeal initially interpreting state legislation. This Court there said:

> "The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the state, which alone, of course, can define its authoritative meaning. We ought not, certainly on this record, either accept the Court of Appeals' construction or, on an independent consideration, reject what the Alabama Supreme Court may later definitively approve. The availability of appropriate declaratory-judgment proceedings under Ala. Code, Tit. 7, §§ 156-168 (1940), avoids this unsatisfactory dilemma. Wise judicial administration in this case counsels that decision of the federal question be deferred until the potentially controlling state-law issue is authoritatively put to rest. See Leiter Minerals, Inc., v. United States, 352 U.S. 220, 228-229, 77 S.Ct. 287, 1 L.Ed. 2d 267. Accordingly, the judgment of the Court of Appeals is vacated to permit a construction of the License Code of the City of Mobile, so far as relevant to this litigation, to be sought with every expedition in the state courts. It is so ordered. * * * "

Likewise in the case of CLAY v. SUN INSURANCE OFFICE LIMITED, 363 U.S. 207, 80 S.Ct. 1222 (1960), this Court vacated a judgment of the Court of Appeals for the Fifth Circuit and required that the case be sent to the Supreme Court of Florida to obtain an interpretation by that Court of Florida Statute 95.02.

That a necessity beyond that suggested by this court in the aforementioned opinions, exists in the case sub judice, by reason of the fact that the Court of Appeals for the Fifth Circuit, in its precipitous interpretation of the Florida Statute governing the holding of prize fights and pugilistic contests, has effectively invalidated the State Statute by its construction of the exemption provisions of that Statute.

(b) One of the considerations governing the granting of certiorari by this Court as set forth in Rule 19(b) of the Rules of this Court, is where a Court of Appeals has rendered a decision in conflict with a decision of another Court of Appeals on the same matter. However, there is no specific provision in this Court's Rules for the granting of certiorari to review a decision of a Court of Appeal which conflicts with a decision of the same Court of Appeal on the same subject matter in the same case. The latter, we suggest, is the situation exemplified by this case and as such we urge that it departs from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

The basis of the Petition's contention here is that the opinion rendered by the Court of Appeals of the Fifth Circuit, on April 9, 1971, directly or by fair implication overruled the decision and opinion of that same Court rendered in the same case on October 10, 1966, reported at 367 F.2d 293. The latter or *first opinion* of the Court of

Appeals found and *adjudicated as a matter of law that the contract on its face was not unlawful and that the Respondent's decendent had the burden of making arrangements for a lawful fight.* (Emphasis supplied.) In the second opinion of April 9, 1971, not yet reported, another panel of the same Court, but including one member of the panel who had participated in the prior opinion of October 10, 1966, held that the evidence disclosed that McDonald had resorted to a subterfuge designed to present a nominal compliance with Florida Law in the performance of the contract. The Petitioner's performance was known to the Court of Appeals on each appearance of the case before that Court, that is, the Petitioner pursuant to the contract had produced the two fighters and they had engaged in a prize fight for the Heavyweight Championship of the World. In the second opinion aforesaid, the Court of Appeals concluded that the eivdence showed that the parties "pursuant to their contract" accomplished an unlawful purpose. If the contract was lawful on its face and demonstrated by its terms what the Petitioner was required to do, then the Court of Appeals should not have found nor did it have a basis to find that " * * * pursuant to their contract (the parties) accomplished an unlawful purpose * * * ". The second opinion completely overruled and negated the holding in the first opinion that required McDonald to conduct a lawful fight although the Court in its second opinion found that he performed all the acts in connection with the promotion of the fight. By its second opinion the Court permitted McDonald to plead his unlawful performance as a bar to the Petitioner's recovery. This is more than an academic conflict; it is a denial to this Petitioner of due process and equal protection of the law. Such a result is not only unfair on its face, but manifestly unjust.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HANSFORD H. TYLER JR.
and DAVID D. PHILLIPS

HORTON & SCHWARTZ
and MURRAY SAMS
410 Concord Building
Miami, Florida 33130

By _____
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari have been mailed to SIBLEY, GIBLIN, LEVENSON & WARD, 605 Lincoln Road, Miami Beach, Florida this day of , 1971.

By _____
Of Counsel